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23 **UNITED STATES DISTRICT COURT**

24 **NORTHERN DISTRICT OF CALIFORNIA-OAKLAND DIVISION**

25 STACIA STINER, et al., on behalf of themselves
and all others similarly situated,

26 Plaintiffs,
vs.

27 BROOKDALE SENIOR LIVING, INC.;
BROOKDALE SENIOR LIVING
COMMUNITIES, INC.; et al.,

28 Defendants.

Case No. 4:17-cv-03962-HSG (LB)

CLASS ACTION

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION TO CERTIFY ORDER FOR
INTERLOCUTORY APPEAL PURSUANT
TO 28 U.S.C. § 1292(b); MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: September 19, 2024
Time: 2:00 p.m.
Place: Courtroom 2
Judge: Hon. Haywood S. Gilliam, Jr.

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on September 19, 2024, at 2:00 p.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Haywood S. Gilliam, Jr., located at 1301 Clay Street, Oakland, California, Plaintiffs Stacia Stiner, *et al.*, on behalf of themselves and all others similarly situated, will, and hereby do, move this Court for an order certifying its July 22, 2024 Order Granting In Part And Denying In Part Plaintiffs' Motion For Certification Of Subclasses And Defendants' Motion For Clarification Of The Court's March 30, 2023 Order (ECF No. 820) for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Specifically, Plaintiffs request that this Court certify for interlocutory appeal the issue of whether the District Court applied the correct legal standard regarding standing, eligibility for statutory damages, and Fed. R. Civ. Proc. 23(b) predominance in Unruh Act cases involving disability access claims.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, the entire file in this matter, and such other matters, both oral and documentary, as may properly come before the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs respectfully request that this Court certify for appeal pursuant to 28 U.S.C. § 1292, the issue of whether the District Court applied the correct legal standard regarding standing, eligibility for statutory damages, and Fed. R. Civ. Proc. (hereafter “Rule”) 23(b)(3) predominance in Unruh Act cases in its Order Granting In Part And Denying In Part Plaintiffs’ Motion For Certification Of Subclasses And Defendants’ Motion For Clarification Of The Court’s March 30, 2023 Order, issued on July 22, 2024 (hereafter “Order”). ECF No. 820.

While interlocutory review is a remedy reserved for “exceptional situations,” the circumstances herein easily meet the criteria for such review. *See, e.g., Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010); *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981). First, the question of whether the district court applied the correct legal standard regarding standing, eligibility for statutory damages, and Rule 23(b) predominance in Unruh Act cases involving disability

1 access claims is a controlling issue of law. The proposed issue for certification raises fundamental
 2 questions regarding standing, jurisdiction, the evaluation of injury and their impact on the
 3 predominance analysis under Rule 23(b)(3). These are pure questions of law and are appropriate for
 4 interlocutory review. The answer to the issue presented will determine whether Plaintiffs' Unruh Act
 5 claims for damages will proceed as a single class action proceeding, or as a multitude of individual
 6 trials regarding damages. Furthermore, courts have held that the denial of class certification raises
 7 controlling questions of law because for many absent class members the effect of such a denial is to
 8 deprive them of their only viable means of vindicating their claims for damages. *See, e.g., Hoffman v.*
 9 *Citibank (S.D.), N.A., No. SACV 06-0571 AG (MLGx), 2007 WL 5659406, at *2 (N.D. Cal. Feb. 15,*
 10 *2007).* Such concerns apply with particular force herein as the putative class members are elderly and
 11 severely disabled, and many will find it too difficult to pursue relief by way of an individual damages
 12 trial. They would be greatly benefitted by the efficiency of a class action proceeding as the only
 13 practicable means of pursuing their claims for statutory minimum damages under the Unruh Act.

14 Second, as the District Court itself has acknowledged, there is "substantial ground for difference
 15 of opinion" on this issue, demonstrated by two groups of decisions from district courts within the Ninth
 16 Circuit regarding Rule 23(b)(3) certification of claims for damages under the Unruh Act that come to
 17 opposite conclusions on this issue. ECF No. 820 at 23 n. 15 ("However, given the divergence of
 18 authorities within the circuit and the significance of the answer for people with disabilities, the Court is
 19 of the view that further clarification regarding the relationship between standing and Rule 23(b)
 20 predominance in Unruh Act cases would benefit the courts and litigants. Accordingly, the Court would
 21 consider a request from the parties to certify this question to the Ninth Circuit.").

22 Third, immediate review of the issue would materially advance this litigation. In its current
 23 posture, this case will in all probability result in numerous individual damages trials that raise the same
 24 or similar issues, and this will greatly increase the judicial resources that the Court must dedicate to the
 25 trial(s) and the resources the litigants must expend on this matter. Further, if multiple individual trials
 26 are necessary, then the length of this already protracted litigation will be greatly increased. If the Ninth
 27 Circuit reverses this Court's Order, however, then this case can be addressed through a single, efficient
 28 class proceeding that addresses the statutory damages of all the elderly residents with mobility and/or

1 vision disabilities. Such a result would be far preferable as there is no genuine dispute that Brookdale's
 2 assisted living facilities do not comply with the minimum accessibility requirements of the Americans
 3 with Disabilities Act of 1990 ("ADA") or the Unruh Act, and the elderly disabled residents and/or their
 4 estates should be compensated for their encounters with violations of the Americans with Disabilities
 5 Act Accessibility Guidelines ("ADAAG") and the California Building Code ("CBC") as intended by
 6 the legislature.

7 Given the importance and unsettled nature of the question presented herein and the significant
 8 impact the answer will have on the trial in this long-running class action case, Plaintiffs respectfully
 9 request that this Court permit appeal of this issue under 28 U.S.C. § 1292(b), to allow the Ninth Circuit
 10 to issue definitive guidance as to whether the District Court applied the correct legal standard regarding
 11 standing, eligibility for statutory damages, and Rule 23(b) predominance in Unruh Act cases involving
 12 disability access claims.

13 **II. RELEVANT PROCEDURAL BACKGROUND**

14 Plaintiffs filed their original motion for class certification on August 18, 2021, seeking
 15 certification of three classes for injunctive relief pursuant to Rule 23(b)(2) and two of those three
 16 classes for damages pursuant to Rule 23(b)(3). ECF No. 278. The first two putative classes sought
 17 declaratory and injunctive relief under the ADA and the Unruh Act, and statutory minimum damages
 18 under the Unruh Act, pursuant to Rule 23(b)(2) and (b)(3) (the "Mobility and Vision Impaired" and
 19 "Disabilities" Classes), respectively. ECF No. 278 at 3. The third putative class sought declaratory and
 20 injunctive relief and damages under the CLRA, the UCL, and the Elder Financial Abuse statute
 21 pursuant to Rule 23(b)(2) and (b)(3) (the "Misleading Statements and Omissions Class"). *Id.*

22 On March 30, 2023, after full briefing by the parties and a hearing on the matter, the Court
 23 granted in part and denied in part Plaintiffs' motion. ECF No. 593. The Court denied certification of
 24 the Disabilities Class and the Misleading Statements and Omissions Class. ECF No. 820 at 1; ECF No.
 25 593 at 61, 73-74. It also denied certification of the Mobility and Vision Impaired Class to pursue ADA
 26 and Unruh Act claims alleging the presence of access barriers in Brookdale's California facilities. ECF
 27 No. 820 at 2; ECF No. 593 at 43. The Court certified only a Wheelchair and Scooter Users Subclass
 28

1 under Rule 23(b)(2) to pursue their Transportation Claims based on the theory that Brookdale's Fleet
 2 Safety Policy violated the ADA. ECF No. 593 at 48.

3 On February 9, 2024, after seeking and receiving leave from the court, Plaintiffs filed their
 4 Motion for Certification of Facility-Level Access Subclasses. ECF Nos. 650, 733, 740. As is relevant
 5 herein, Plaintiffs argued that, for the subclasses seeking statutory damages under Rule 23(b)(3), liability
 6 could be determined using common proof and that this would predominate over any individualized
 7 issues. Specifically, "Plaintiffs' inspections have produced objective measurements and data that show
 8 that Brookdale's newly constructed facilities violate the 1991 ADAAG and the CBC," which
 9 "establishes Defendants' liability under the ADA and the Unruh Act as to all members of the proposed
 10 damages subclasses." ECF No. 740 at 29; ECF No. 820 at 17. Following the adjudication of classwide
 11 liability, the determination of individual damages with respect to statutory minimum damages under the
 12 Unruh Act could be determined using a sworn claims form process. ECF No. 740 at 22-23; ECF No.
 13 805 at 12-14. This would allow class members to use affidavits to identify the ADAAG and/or CBC
 14 violations they encountered, thus resulting in injury and the denial of full and equal access under the
 15 ADA and the Unruh Act, and confirm that such encounters caused them difficulty, discomfort or
 16 embarrassment under Cal. Civ. Code § 55.56(b), (c). *Id.* Damages calculations would then involve
 17 multiplying \$4,000 by the number of occasions class members indicate they encountered ADAAG
 18 and/or CBC violations that caused them difficulty, discomfort or embarrassment. ECF No. 740 at 23.

19 Defendants opposed Plaintiffs' motion, claiming that standing to recover damages under the
 20 Unruh Act requires "a highly individualized inquiry" that defeats predominance. Specifically,
 21 Defendants argued that assessing standing to recover damages under the Unruh Act on a class wide
 22 basis is "infeasible" because "(1) members have different types of disabilities, (2) the nature of
 23 residents' impairments resulting from those vision and/ or mobility disabilities differs, and (3) the
 24 services required by Brookdale staff to assist residents with their different impairments can vary." ECF
 25 No. 820 at 18 (citing ECF No. 783 at 22-23). In other words, each putative class member would have to
 26 prove that the barrier actually interfered with his or her full and equal enjoyment of their Brookdale
 27 facility. Defendants also argued that, because this inquiry focuses on whether class members suffered
 28

1 any injury at all, it is actually a jurisdictional element that cannot be established via a claims form
 2 process. ECF No. 820 at 19 (citing ECF No. 783 at 25).

3 The Court agreed with Defendants “with some reluctance” and denied certification of Plaintiffs’
 4 proposed Unruh Act 23(b)(3) damages subclasses because it found individual issues would
 5 predominate. In so doing, the Court relied on “other authorities finding the standing inquiry to be a
 6 fact-intensive, individualized liability issue rather than a pure damages one.” ECF No. 820 at 19-20,
 7 citing *Moeller v. Taco Bell Corp.*, No. C 02-5949 PJH, 2012 WL 3070863, at *5 (N.D. Cal. July 26,
 8 2012) (denying certification of Rule 23(b)(3) damages class, finding “damages for California disability
 9 claims are inextricably intertwined with individualized liability questions.”); *Vondesaar v. Starbucks*
 10 *Corp.*, No. CV 12-05027 DDP (AJWx), 2015 WL 629437, at *4 (C.D. Cal. Feb. 12, 2015), *aff’d*, 719 F.
 11 App’x 657 (9th Cir. 2018) (denying certification of Rule 23(b)(3) Unruh Act damages class because
 12 individualized inquiries would predominate over whether counter heights violated the ADA);
 13 *Antoninetti v. Chipotle Mexican Grill, Inc.*, No. 06cv02671 BTM (WMc), 2012 WL 3762440, at *6
 14 (S.D. Cal. Aug. 28, 2012).

15 In its opinion, the District Court acknowledged that several other courts in the Ninth Circuit
 16 have come to the opposite conclusion regarding Rule 23(b)(3) damages classes alleging Unruh Act
 17 claims. ECF No. 820 at 21-22. In *Nevarez v. Forty Niners Football Co. LLC*, 326 F.R.D. 562 (N.D.
 18 Cal. 2018), which dealt with ADAAG violations at Levi’s Stadium, the court found predominance was
 19 satisfied and certified a Rule 23(b)(3) damages class under the Unruh Act, employing a claims form
 20 process to determine entitlement to damages similar to that proposed by Plaintiffs herein. *Id.* at 584-86,
 21 589. In *Davis v. Laboratory Corp. of America Holdings*, 604 F. Supp. 3d 913 (C.D. Cal. 2022), *aff’d*,
 22 No. 22-55873, 2024 WL 489288 (9th Cir. Feb. 8, 2024), the court similarly approved the use of a
 23 claims form process following the liability determination. *Id.* at 929-30. The Court also acknowledged
 24 *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009), which certified ten subclasses to
 25 pursue Unruh Act damages at Burger King restaurants, but disregarded its persuasive value on the basis
 26 that the *Castaneda* court did not conduct a specific predominance analysis. ECF No. 820 at 21.

27 The District Court then stated that “the real question seems to be whether standing can be
 28 established by a claims process in an Unruh Act access barrier case where class members’ interaction

1 with the barriers is variable.” *Id.* In other words, the Court found that “standing questions here
 2 implicate the actual existence of injury, rather than just the arithmetic of damages.” *Id.* at 22.

3 **III. ISSUE PRESENTED**

4 Whether this Court should certify to the Ninth Circuit for interlocutory review pursuant to 28 U.S.C.
 5 § 1292 the following issue: What are the correct legal standards for evaluating standing, eligibility for
 6 damages, and predominance under Fed. R. Civ. Proc. 23(b)(3) in cases under the Unruh Civil Rights Act
 7 involving disability access claims?

8 **IV. LEGAL STANDARD**

9 Interlocutory review of an order is proper where the District Court decision involves (1) A
 10 “Controlling Question of Law” (2) “As to which there is substantial ground for difference of opinion,” and
 11 that (3) “An immediate appeal from the order may materially advance the ultimate termination of the
 12 litigation.” 28 U.S.C. § 1292(b); *Couch*, 611 F.3d at 633. Certification under section 1292(b) “requires the
 13 District Court to expressly find in writing that all three § 1292(b) requirements are met.” *Id.* As discussed
 14 below, each of these requirements is satisfied in this case.

15 **V. ARGUMENT**

16 **A. Whether The District Court Applied The Correct Legal Standard Regarding Standing, 17 Eligibility For Statutory Damages, And Predominance Under Rule 23(b)(3) In Unruh 18 Act Cases Presents A Controlling Question Of Law**

19 A question of law is “controlling” if “resolution of the issue on appeal could materially affect
 20 the outcome of the litigation in the district court.” *In re Cement Antitrust Litig.*, 673 F.2d at 1026.
 21 Courts have not required “that reversal of the district court’s order terminate the litigation.” *Id.* (citing
 22 *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959)). Controlling questions of law “are
 23 usually fundamental issues, such as who are proper parties, whether a court has jurisdiction, and
 24 whether state or federal law should apply.” *Heaton v. Soc. Fin., Inc.*, No. 14-cv-05191-TEH, 2016 WL
 25 232433, at *3 (N.D. Cal. Jan. 20, 2016) (citing *In re Cement*, 673 F.2d at 1026). A controlling question
 26 of law “may only be found in those ‘exceptional situations in which allowing an interlocutory appeal
 27 would avoid protracted and expensive litigation.’” *Flores v. Velocity Express, LLC*, No. 12-cv-05790-
 28 JST, 2015 WL 4463639, at *2 (N.D. Cal. July 21, 2015) (quoting *In re Cement*, 673 F.2d at 1026). Notably, “[a] steadily growing number of decisions’ have found ‘that a question is controlling ... if

1 interlocutory reversal might save time for the district court, and time and expense for the litigants.”” *Su*
 2 *v. Siemens Indus., Inc.*, No. 12-cv-03743-JST, 2014 WL 4775163, at *2 (N.D. Cal. Sept. 22, 2014)
 3 (quoting 16 Wright, Miller & Cooper, Fed. Prac. & Proc. (Juris.) § 3930 (3d. ed.)).

4 Whether the District Court applied the correct legal standards regarding standing, eligibility for
 5 statutory damages, and Rule 23(b) predominance in Unruh Act cases involving disability access claims
 6 plainly constitutes a “controlling question of law.” Indeed, in its opinion, the District Court itself
 7 acknowledged that “given the divergence of authorities within the circuit and the significance of the
 8 answer for people with disabilities, the Court is of the view that further clarification regarding the
 9 relationship between standing and Rule 23(b) predominance in Unruh Act cases would benefit the
 10 courts and litigants” and invited a request for certification of this issue from the parties. ECF No. 820
 11 at 23 n.15.

12 As discussed, controlling questions of law are raised where there are “fundamental questions”
 13 such as who is a proper party, and whether the court has jurisdiction of their claims. *In re Cement*, 673
 14 F.2d at 1026-27. Here, this Court has expressly found that such questions are presented. As the Court
 15 stated in its opinion, it is “of the view that the standing questions here implicate the actual existence of
 16 injury, rather than just the arithmetic of damages.” ECF No. 820 at 22. “In the absence of controlling
 17 Ninth Circuit authority that squarely permits establishment of this jurisdictional element through a
 18 claims process, the Court finds *Moeller*, *Antoninetti*, and *Vondersaar* persuasive.” *Id.* Thus, if the
 19 Ninth Circuit were to reverse on this issue, the outcome of the motion to certify damages subclasses
 20 under Rule 23(b)(3) would be different.

21 Moreover, a decision from the Ninth Circuit on this issue regarding standing and the propriety of
 22 Rule 23(b)(3) certification would heavily impact the scope, the time investment required by both the
 23 District Court and the litigants, and the expense of the upcoming trial(s) in this matter. Under the
 24 current procedural posture, each class member’s claim for damages will need to be litigated as an
 25 individual action, requiring numerous separate damages trials in the District Court. This would require
 26 a substantial investment of time and resources for all parties involved. However, if this Court’s Order
 27 were to be reversed, the class members’ claims for damages would proceed as a certified class in a
 28 single efficient proceeding. This would greatly decrease the time investment of the District Court, and

1 also time and expense for the litigants. Further, because Plaintiffs do not seek a stay in conjunction
 2 with the appeal, the upcoming trial(s) in this matter would not be delayed pending appeal. Thus, given
 3 the material effect the outcome of an interlocutory appeal would have on the length and expense of the
 4 proceedings herein, this issue presents a controlling question of law.

5 Additionally, an answer to this question by the Ninth Circuit would determine whether *any*
 6 Unruh Act claims for damages involving disability access barriers may proceed on a class wide basis in
 7 the future, or if they must always be litigated individually. Indeed, if the District Court's opinion were
 8 allowed to stand, the damages phase in all future disability access class actions under the Unruh Act
 9 would have to be tried as individual actions, thereby greatly increasing the overall difficulty, time and
 10 cost investment required for persons with disabilities to recover statutory damages for injuries and
 11 discrimination they suffer due to encounters with violations of the ADAAG and the CBC. The reversal
 12 of the District Court's opinion would do the opposite, permitting the consolidation and simplification of
 13 future proceedings, thereby saving time for courts and time and expense for future litigants. In other
 14 words, an answer from the Ninth Circuit on this controlling question of law would have major
 15 implications for this important area of civil rights law.

16 **B. Multiple District Court Opinions Demonstrate That There Is Substantial Ground for
 17 Difference Of Opinion On The Legal Standards for Evaluating Standing, Eligibility
 For Statutory Damages, And Rule 23(b)(3) Predominance In Unruh Act Cases**

18 The “substantial ground for difference of opinion” prong is satisfied when ““novel legal issues
 19 are presented, on which fair-minded jurists might reach contradictory conclusions.”” *ICTSI Or., Inc. v.
 20 Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1130 (9th Cir. 2022) (quoting *Reese v. BP Expl.
 21 (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011)). In order to determine if a “substantial ground for
 22 difference of opinion” exists, “courts must examine to what extent the controlling law is unclear.”
 23 *Couch*, 611 F.3d at 633. A ““substantial ground for difference of opinion exists where reasonable
 24 jurists might disagree on an issue’s resolution, not merely where they have already disagreed.”” *Su*,
 25 2014 WL 4775163, at *3 (quoting *Reese*, 643 F.3d at 688). Indeed, the ““identification of a sufficient
 26 number of conflicting and contradictory opinions would provide substantial ground for disagreement.””
 27 *Couch*, 611 F.3d at 634 (quoting *Union Cnty., Iowa v. Piper Jaffray & Co, Inc.*, 525 F.3d 643, 647 (8th
 28 Cir. 2008)).

1 This prong is clearly satisfied herein. As this Court noted in its opinion, reasonable jurists
 2 within the Ninth Circuit have disagreed on this issue on multiple occasions and the Ninth Circuit has yet
 3 to address in a published opinion the propriety of certifying Rule 23(b)(3) classes for damages under the
 4 Unruh Act in disability access cases. ECF No. 820 at 23 n.15. The group of cases that the District
 5 Court found, admittedly “with some reluctance,” more persuasive “recognized the individualized nature
 6 of the standing inquiry in the context of the Unruh Act, and found it to pose a core question of
 7 substantive liability.” *Id.* at 19.

8 In *Moeller v. Taco Bell Corp.*, 2012 WL 3070863 (N.D. Cal. July 26, 2012), a class action
 9 involving up to 150,000 class members challenging access barriers in approximately 220 California
 10 Taco Bell restaurants, Defendants moved for decertification following the Supreme Court’s decision in
 11 *Wal-Mart Stores, Inc. v. Dukes*, 562 U.S. 338 (2011). *Id.* at *2. The *Moeller* court examined whether it
 12 could certify a Rule 23(b)(3) class for statutory damages under the Unruh Act, but ultimately declined
 13 to do so because of, *inter alia*, a lack of predominance. *Moeller*, 2012 WL 3070863, at *5.
 14 Specifically, the court found that “damages for California disability claims are inextricably intertwined
 15 with individualized liability questions, and it is thus impossible to make an across-the-board conclusion
 16 as to the recovery of damages by any class member.” *Id.* Common questions of law and fact did not
 17 predominate over individualized questions regarding how each class member “was personally affected
 18 and was denied full and equal access” because “the issue is whether an individual class member has any
 19 claim at all.” *Id.*

20 In *Antoninetti v. Chipotle Mexican Grill, Inc.*, 2012 WL 3762440 (S.D. Ca. Aug. 28, 2012),
 21 mobility device users brought a class action suit against Chipotle, alleging non-compliant counter
 22 heights in all of its California restaurants. As to the claims for damages under the Unruh Act, the court
 23 denied certification. It found individualized issues predominated since establishing entitlement to
 24 damages “is a fact-intensive inquiry” that requires “each class member to establish which Chipotle
 25 restaurant he visited, when he visited it, and whether he traveled the food service line – all as to each
 26 particular occasion for which the class member seeks damages.” *Id.* at *6. The court also determined
 27 that a person would have to “establish that he was actually unable to see his food prepared, which will
 28 in turn require at least proof of how high the counter wall was at the time of the visit... and how high

1 the class member sat in his wheelchair at the relevant time.” *Id.*

2 Similarly, in *Vondersaar v. Starbucks Corp.*, 2015 WL 629437, *aff’d*, 719 App’x 657 (9th Cir.
 3 2018), wheelchair and scooter users brought a nation-wide class action alleging noncompliant counter
 4 heights at Starbucks stores, including a Rule 23(b)(3) class seeking damages under the Unruh Act for
 5 only the California stores. Citing *Moeller* and *Antoninetti*, the *Vondersaar* court found that in order to
 6 recover Unruh Act damages “each class member must show how he or she was personally affected and
 7 was denied full and equal access by the defendant.” *Id.* at *3. The court denied certification of the
 8 (b)(3) damages class finding that, similar to *Antoninetti*, individualized inquiries would predominate
 9 over the common question of whether the counter heights violated the ADA. *Id.* at *4.

10 In their motion, however, Plaintiffs urged the District Court to follow another group of cases
 11 within the Ninth Circuit that have come to the opposite conclusion when confronted with this same
 12 issue. In *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009), a group of mobility-
 13 impaired customers of 92 California Burger King stores brought a putative class action alleging that
 14 numerous access barriers violated the ADA and the Unruh Act. While the court denied certification of
 15 the statewide Rule 23(b)(3) class due in part to substantial physical variation across locations, it did
 16 certify Rule 23(b)(3) classes for each of the 10 restaurants the named plaintiffs had visited. *Id.* at 564.
 17 The court found that “class certification is more appropriately analyzed under Rule 23(b)(3) instead of
 18 Rule 23(b)(2)” because the value of damages “will require an individual-by-individual determination as
 19 to who visited which stores and how many times.” *Id.* at 571.

20 In *Nevarez v. Forty Niners Football Co., LLC*, 326 F.R.D. 562 (N.D. Cal. 2018), stadium
 21 patrons with mobility disabilities and their companions brought a class action suit against the owners
 22 and operators of Forty Niners stadium, alleging violations of the ADA and Unruh Act due to pervasive
 23 access barriers. Then-district court Judge Koh found that individual issues did not predominate and
 24 certified a Rule 23(b)(3) damages class for Plaintiffs’ Unruh Act claims. As in this case, Plaintiffs
 25 argued that class members would only need to show that they “personally encountered” an Unruh Act
 26 violation that caused them “difficulty, discomfort or embarrassment” and that “damages calculations
 27 will come down to multiplying \$4,000 by the number of class members’ visits to the Stadium.” *Id.* at
 28 585. The *Nevarez* court distinguished *Moeller* and *Antoninetti* based on the difference in the scale of

1 the cases, the number of class members, the fact that Defendants have a record and contact information
 2 for class members, and the number of challenged facilities at issue. *Id.* at 585-86. The *Nevarez* court
 3 also found that *Moeller* and *Antoninetti* were both decided “*after* the defendants’ liability had been
 4 adjudicated, which meant that the most important common question had already been resolved” and
 5 therefore no longer predominated. *Id.* at 586. The court ultimately found *Burger King* persuasive and
 6 certified a Rule 23(b)(3) damages class, using a claims form process similar to that proposed in this case
 7 to establish entitlement to damages and to calculate the amount thereof.

8 In *Davis v. Laboratory Corp. of America Holdings*, 604 F. Supp. 3d 913 (C.D. Cal. 2022), *aff’d*,
 9 No. 22-55873, 2024 WL 489288 (9th Cir. Feb. 8, 2024), visually impaired individuals sought
 10 certification of a nationwide class under Rule 23(b)(2) and a California class under Rule 23(b)(3)
 11 alleging violations of, *inter alia*, the ADA and the Unruh Act for failing to provide accessible
 12 touchscreen kiosks for self-service check-in at Defendants’ patient service centers. Plaintiffs proposed
 13 the use of a claims form following the liability adjudication arguing that it is “well-settled that this issue
 14 may [be] properly addressed” in that manner. *Id.* at 929. Much like Brookdale, the defendants argued
 15 that determining whether each class member used one of the kiosks would be a highly individualized
 16 inquiry. *Id.* The *Davis* court found this unpersuasive, noting that “predominance is not concerned with
 17 determining who may be entitled to class membership, *i.e.*, identifying legally blind class members who
 18 attempted to or were discouraged from using LabCorp’s kiosks. Rather, the superiority prong is where
 19 that issue is considered.” *Id.* Citing *Nevarez*, the court held that the question of whether class members
 20 personally encountered a kiosk would not predominate over the “more important common questions of
 21 fact and law” such as whether the kiosks are actually accessible. *Id.* at 929, 932-33.

22 **C. Determining Whether The District Court Applied The Correct Legal Standard**
 23 **Regarding Standing, Eligibility For Statutory Damages, And Rule 23(b) Predominance**
 in Unruh Act Cases Will Materially Advance This Litigation

24 The “materially advance” prong is satisfied “when the resolution of the question ‘may
 25 appreciably shorten the time, effort, or expense of conducting’ the district court proceedings.” *ICTSI*
 26 *Or., Inc.*, 22 F.4th at 1131 (quoting *In re Cement*, 673 F.2d at 1027). Courts in the Ninth Circuit “have
 27 held that resolution of a question materially advances the termination of litigation if it ‘facilitate[s]

28 disposition of the action by getting a final decision on a controlling legal issue sooner, rather than later

1 [in order to] save the courts and the litigants unnecessary trouble and expense.”” *Silbersher v. Allergan*
 2 *Inc.*, No. 18-cv-03018-JCS, 2021 WL 292244, at *3 (N.D. Cal. Jan. 28, 2021) (quoting *United States ex*
 3 *rel. Atlas Copco Compressors LLC v. Rwt LLC*, No. 16-00215 ACK-KJM, 2017 WL 2986586, at *11
 4 (D. Haw. July 13, 2017)). The language of the statute requires only that the appeal *may* materially
 5 advance the ultimate termination of the litigation. Certification is thus proper even if there is only the
 6 possibility of saving the time of the district court and expense to the litigants. Indeed, courts apply
 7 “pragmatic considerations to determine whether certifying non-final orders will materially advance the
 8 ultimate termination of the litigation.” *Silbersher*, 2021 WL 292244, at *3 (quoting *United States ex*
 9 *rel. Integra Med Analytics LLC v. Providence Health & Servs.*, No. CV 17-1694 PSG (SSx), 2019 WL
 10 6973547, at *4 (C.D. Cal. Oct. 8, 2019)).

11 An opinion from the Ninth Circuit reversing this Court’s decision would materially advance this
 12 litigation. As discussed above, the cost in both time and money of nearly identical individual damages
 13 trials for numerous class members would impose a heavy burden on both the Court and the litigants.
 14 Indeed, in total there are several hundred class members who would fall within the subclasses for the six
 15 facilities at which the named Plaintiffs reside or resided, and it is probable that many would have viable
 16 claims for statutory minimum damages under the Unruh Act. It is also important to note that the burden
 17 of coming forward and trying their individual claims for damages would be imposed on elderly class
 18 members with mobility and/or vision disabilities, who would be required to file a separate action and
 19 appear and testify in court instead of affirming their experiences via a claims form. Such expensive,
 20 protracted, and burdensome litigation could be avoided almost entirely by the resolution of this single
 21 legal issue at this juncture. The Ninth Circuit’s ruling on this appeal could result in a substantial
 22 reduction of that burden by permitting the damages phase to proceed as a single class action proceeding
 23 instead of numerous individual damages trials.

24 **VI. CONCLUSION**

25 For the reasons stated herein, Plaintiffs respectfully request that their motion be granted.

26 Dated: August 15, 2024

Respectfully submitted,

27 /s/ Guy B. Wallace

Guy B. Wallace

28 Attorneys for Plaintiffs and the Proposed Subclasses

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States District Court, Northern District of California, by using the Court's CM/ECF system on August 15, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

Dated: August 15, 2024

/s/ Guy B. Wallace
Guy B. Wallace